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NO. 87-1466

In the Supreme Court of the United States

OCTOBER TERM, 1987

FRED H. AINSWORTH AND GLORIA AINSWORTH
Petitioners

versus

SHELL OFFSHORE INC.
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Fifth Circuit was correct in affirming the district court's grant of summary judgment dismissing plaintiff's Louisiana law tort claims where suit had been pending for over a year-and-a-half prior to defendant's filing a motion for summary judgment, plaintiffs never requested, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, that defendant's motion for summary judgment be denied or continued pending further discovery, and the undisputed evidence presented to the district court revealed that there was no genuine issue as to any material fact and that Shell Offshore Inc. was entitled to judgment as a matter of law?

LIST OF INTERESTED PERSONS

1. Fred H. Ainsworth and Gloria Ainsworth
   Plaintiffs/Petitioners

2. Shell Offshore Inc.[1]
   Defendant/Respondent

3. Shell Oil Company

4. Hercules Offshore Drilling Company

5. Midland Insurance Company

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[1] Pursuant to Supreme Court Rule 28.1, Shell Offshore Inc. provides the following list of its parent, subsidiary and affiliate companies:

Shell Energy Resources Inc.
Pecten International Company
Scailop Coal Corporation
Shell Gas Pipeline Company
Shell Gas Trading Company
Shell Mining Company
Shell Western E & P Inc.
SOI Royalties Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Shell Offshore Inc., respectfully prays that the Petition for Writ of Certiorari filed by Petitioners in this case, requesting review of the decision of the United States Court of Appeals for the Fifth Circuit entered October 14, 1987, and its denial of the Petition for Panel Rehearing entered on November 9, 1987, be denied, for the reasons set forth below.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit rendered its opinion on October 14, 1987 (Petitioners' App. at B1-B23). This opinion is reported at 829 F.2d 548.

The United States District Court for the Western District of Louisiana rendered its opinion on December 8, 1986 (Petitioners' App. at C1-C31). The district court

opinion is reported at 649 F.Supp. 1223.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit (Petitioners' App. at B1 - B23) was entered on October 14, 1987. A Petition for Panel Rehearing was denied on November 9, 1987 (Petitioners' App. at A1 - A2). The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C.A. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Federal Rule of Civil Procedure 56 (reproduced in Appendix).

2. Louisiana Civil Code Art. 2315.

> LIABILITY FOR ACTS CAUSING DAMAGES.
> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
>
> Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

3. Louisiana Civil Code Art. 2317.

> ACTS OF OTHERS AND OF THINGS IN CUSTODY.
> We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the acts of persons for whom we are answerable, or of the things

which we have in our custody. This, however, is to be understood with the following modifications.

4. Louisiana Civil Code Art. 2322.

DAMAGE CAUSED BY RUIN OF BUILDING. The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction.

STATEMENT OF THE CASE

Petitioners, Fred H. Ainsworth and Gloria Ainsworth, filed suit against Shell Offshore Inc. (originally incorrectly referred to as Shell Oil Company and hereinafter referred to as "Shell") on January 16, 1985, alleging that Shell, as the owner of a fixed platform on which plaintiff's employer, Hercules Offshore Drilling Company (hereinafter referred to as "Hercules"), had been hired to erect its drilling rig, was somehow responsible for injuries allegedly sustained by Mr. Ainsworth in an accident which occurred on October 25, 1984 during construction of the Hercules rig by the Hercules crew. Subsequently, Shell filed a third party complaint against Hercules.

An initial pre-trial conference was set for January 3, 1986. According to the rules of the district court, discovery was to be completed and all motions to compel discovery filed on or before January 3, 1986. At the pre-trial conference, trial was set to begin September 15, 1986, with a new cut-off date for dispositive motions and the taking of discovery being set for August 15, 1986. During the time between January 3, 1986 and August 15, 1986, discovery was undertaken by plaintiffs as well as defendants.

On August 15, 1986, over a year-and-a-half after the complaint had been filed, Shell filed its motion for summary judgment. It should be noted that pursuant to the previously mentioned deadlines, this motion was filed on the dispositive motion cut-off date, which was also the discovery cut-off date. Shell supported its Motion for Summary Judgment with the deposition testimony of several persons, including the plaintiff, as well as a copy of the Master Drilling Agreement and Marine Bid and Drilling Order which existed between Shell and Hercules.

Plaintiff filed an opposition to Shell's Motion for Summary Judgment on August 25, 1986. The opposition contained no affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, nor was any request ever made of the district court that it refuse the application for summary judgment or order a continuance to permit discovery to be had prior to ruling on the motion.

The Motion for Summary Judgment was under advisement by the district court until ruled upon on December 9, 1986. During the time the motion was under advisement, plaintiffs undertook discovery, noticing and re-noticing the depositions of numerous doctors in preparation for trial. However, no deposition notices were ever filed for any fact witness during this time period.

On December 9, 1986, the district court ruled, granting Shell's Motion for Summary Judgment and setting forth findings of fact and conclusions of law. (Petitioners' Appendix at C1-C31). This judgment was affirmed by the United States Court of Appeals for the Fifth Circuit on October 14, 1987. (Petitioners' Appendix at B1-B23). A Petition for Panel Rehearing was denied on November 9, 1987. (Petitioners' Appendix at A1-A2). Subsequently, petitioners filed this writ of certiorari.

The facts underlying this case are not in serious dispute. Shell owns an offshore platform permanently affixed to the floor of the Gulf of Mexico on the Outer Continental Shelf off the Louisiana coast in Vermilion Block 221. In order to utilize the platform to explore for oil and gas, a drilling rig must be brought to and assembled on the platform. Shell hired an independent contractor, Hercules, to furnish the rig and drill the well from the bare Shell platform.

Pursuant to the contract between Shell and Hercules, Hercules was obligated to transport its drilling rig offshore and assemble it on Shell's platform. Petitioners allege that Mr. Ainsworth was injured on October 25, 1984, during the rigging up of Hercules' rig when, during a night shift, he dropped a tool, searched for it in the dark and fell into a mud tank on the Hercules rig.

Even when taken in a light most favorable to the petitioners, the undisputed facts reveal no genuine issues. The Master Drilling Agreement between Shell and Hercules clearly shows that Hercules contracted with Shell to operate as an independent contractor in the performance of all work under the contract. Shell was to give no directional control over the work and was to have only a general right of inspection to secure satisfactory completion of the contract. Hercules, on the other hand, was to perform and supervise all work as an expert independent contractor. This was confirmed by Ainsworth himself in his deposition, as well as by the deposition testimony of the president of Hercules, Mr. Coward.

The deposition testimony submitted to the district court further showed that Hercules had three supervisors on its rig and that Ainsworth received all his orders from these individuals. While Hercules had 20 to 25 people present, Shell had only one or two, who were operating in the position of "company man".

The deposition of Mr. Coward, as well as the deposition of the plaintiff and the affidavit of Darrel Cruise, confirmed that no Shell employees participated in the rig-up. In fact, Cruises's affidavit, which was submitted by petitioners in opposition to the Motion for Summary Judgment, specifically states that instructions regarding the work were given to the Hercules crew by one of the Hercules toolpushers.

The undisputed evidence presented to the district court also indicated that Hercules owned the rig, including the area in which Mr. Ainsworth fell, and that Hercules owned all equipment used in the rig-up. According to the testimony of Mr. Coward, Hercules had sole responsibility, charge, supervision, custody, care and control of all such property, and had the responsibility for providing all lighting on the platform. Specifically, Coward testified that the Hercules toolpusher was responsible for making sure that lighting was proper and adequate.

The undisputed evidence at the trial court level indicated that at the time of the accident, the construction of the rig was no more than 25% to 50% complete and that at least 3 or 4 more days would be necessary to finish building the rig. As will be discussed in more detail below, it is respectfully submitted that on these, facts, the district court was entirely correct in granting Shell's Motion for Summary Judgment and the appellate court was entirely correct in affirming this ruling.

ARGUMENT

I. *No Special and Important Reasons Exist to Grant Certiorari*

For many years, in determing whether writs of certiorari should be granted, this Court has applied the principle

> . . . that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

Layne and Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 67 L.Ed. 712, 714, 43 S.Ct. 422, 423 (1923). For this reason, U.S. Supreme Court Rule 17.1 makes clear that review on writ of certiorari will be granted only when there are "special and important reasons therefore". The rule sets forth the following examples of the "character of reasons" that will justify review:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Reference to petitioners' papers in this matter will show the noticeable absence of any statement regarding

the existence of such "special and important reasons" for review. The explanation for this, of course, is that no such reasons exist. Certainly there is no conflict among the federal courts of appeal on the issues involved here; nor does the decision of the court of appeals conflict on any federal question with a state court of last resort; nor does this case present an important and undecided question of federal law; nor does the court of appeals' decision conflict with applicable decisions of this Court; nor have any of the lower courts departed from the accepted and usual course of judicial procedings. Rather, this case, which involves primarily questions of the application and interpretation of Louisiana law, has been carefully reviewed and correctly decided by the United States District Court for the Western District of Louisiana and the United States Court of Appeals for the Fifth Circuit. Petitioners' writ of certiorari should be denied since the case lacks the type of elements which this Court has traditionally required before exercising its review.

Rather than pointing out any "special and important reasons" why the case should be heard, petitioners apparently argue (1) that the lower courts improperly granted summary judgment to respondent; and (2) that in so doing, the lower courts misapplied Louisiana Law, which controlled the substantive issues in this platform case. As will be pointed out below, however, the handling of this case by the lower courts was entirely correct, both procedurally and substantively.

II. *The Procedural Handling of This Case by the Lower Courts Was In Complete Compliance With the Guidelines Set Forth By This Court*

In a recent triumvirate of cases, this Court has clearly and concisely set forth the standards which should guide the handling and review of motions for summary judgment. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct.

2548, 91 L.Ed. 265 (1986); *Matsushita Elec. Inc. Co. v. Zenith Radio,* 475 U.S. 574, 89 L.Ed.2d 538, 106 S.Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Specifically, this Court has stated:

> . . . the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex, 106 S.Ct. at 2552-53, 91 L.Ed.2d at 273. The standard of Rule 56 provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise proper motion for summary judgment; what is required is that there is no *genuine* issue of *material* fact. *Anderson,* 91 L.Ed. at 211. One opposing a motion for summary judgment must do more than simply show that there is some 'metaphysical doubt' as to the material facts. *Matsushita Electric,* 475 U.S. at 586, 89 L.Ed.2d at 552. The question as to which facts are material is one which will be determined by reference to the applicable substantive law. Only disputes over facts that might affect the outcome of the suit properly preclude the entry of summary judgment. "Factural disputes that are irrelevant or unnecessary will not be counted." *Anderson,* 91 L.Ed.2d at 202.

As wil be discussed more fully below, petitioners made claims against respondent pursuant to Louisiana Civil Code Articles 2315, 2317 and 2322. In order to establish liability under each of these articles, certain elements must be shown. The lower courts agreed with respondent's contentions that petitioners, who would bear the burden of proof on each of these elements at trial, had failed to make a showing sufficient to establish the existence of at least one of these elements with regard to each of the asserted bases of liability. Accordingly, summary judgment was proper under the rule enunciated by this Court in the language quoted above from the *Celotex* case.

Petitioners initially claim that respondent's motion was improperly supported because "the only evidence submitted by Shell was a copy of its contract with Hercules." (Petitioners' writ application at p. 10). As the opinion of the United States Court of Appeals for the Fifth Circuit makes clear, this statement is obviously inaccurate in that Shell's motion was also supported by the deposition testimony of the plaintiff himself, as well as that of William Coward, the president of Hercules, and Arthur Dunn, a Shell purchasing executive. The support for Shell's motion was clearly more than sufficient in view of the statements in *Celotex* and the plain language of Rule 56(a) that a party may move for summary judgment "with or without supporting affidavits." The lower courts, which considered the evidence submitted by Shell and the opposing evidence submitted by petitioners, clearly believed that the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" showed that there was no genuine issue as to any material fact and that Shell was entitled to judgment as a matter of law.

Petitioners also complain that the motion was ruled upon before they had the opportunity to complete discovery. In order to evaluate this claim, the procedural

history of the case must be kept in mind. By the time Shell's motion was filed, the case had been pending for approximately one-and-a-half years and was one month from the scheduled trial date. Two court-imposed discovery cut-off deadlines had already passed. Petitioners took no depositions while this case was pending at the district court level. In fact, even after the motion was filed and while it was under advisement, petitioners requested only that certain medical depositions be taken and made no attempt to notice any depositions reagrding the issues involved in the motion. Respondent submits that this is because petitioners erroneously believed that the motion would be denied when, in fact, they had failed to make a showing sufficient to establish the existence of elements essential to their case. *Celotex,* 91 L.Ed.2d at 273.

Given the time that this case had been on the docket and the fact that the parties had conducted discovery, no serious claim can be made that petitioner was in any way "railroaded" by a premature motion. As is pointed out in *Celotex,* any potential problem with such motions can be adequately dealt with under Rule 56(f), which allows the Court to refuse an application for summary judgment or order a continuance to permit affidavits to be obtained or depositions to be taken, if it appears from the affidavits of a party opposing a motion for summary judgment that he cannot, for reasons stated in his affidavit, present facts essential to his opposition. In the instant case, petitioners never made a request for denial or continuance of the motion in accordance with the simple procedure set forth in Rule 56(f). In the absence of such an affidavit, or some equivalent statement, the district court in this matter need not have considered a continuance. *Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1194 (5th Cir. 1986). Petitioners essentially suggest that the district court should have engaged in an exercise in mind reading and determined that they desired to do further discovery. This is, of course, not required

under Rule 56 or the relevant decisions of this Court.

Furthemore, even if petitioners had made a request pursuant to Rule 56(f), the decision as to whether to grant a continuance in order to allow a party to proceed with further discovery is one which rests within the discretion of the trial court, to be disturbed on appeal only if its decision reflects an abuse of discretion. *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1029 (5th Cir. 1983); *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 550 (5th Cir. 1980), *cert deneid*, 454 U.S. 927 (1981); *Walters v. City of Ocean Springs*, 626 F.2d 1317, 1321 (5th Cir. 1980). As recited above, the procedural history of this case makes clear that the trial court would have had more than adequate reasons to deny a request for continuance and would have been totally within its discretion in doing so.

In summary, the lower courts handled this matter correctly from a procedural standpoint. Respondent's Motion for Summary Judgment was properly supported, and the record and opinions of the lower courts indicate that they carefully considered the evidence before them and determined that there were no genuine issues of any material fact. Considering that this is precisely what Rule 56 and the relevant decisions of this Court require to be done, respondents suggest that there is no issue worthy of review here and that petitioners' writ of certiorari should be denied.

III. *The Decision of the Lower Courts Is Correct Under Applicable Louisiana Law*

Another compelling reason why review should be denied in this case is that all the substantive questions with regard to liability were controlled by the law of the State of Louisiana since the accident sued upon occurred on a stationary and fixed platform located on the Outer

Continental Shelf off the coast of Louisiana. State law, of course, applies on such platforms as surrogate federal law. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 22 L.Ed.2d 360, 89 S.Ct. 1835 (1969). Petitioners presented claims under Louisiana Civil Code Articles 2315, 2317 and 2322, each of which requires the proof of certain elements in order to establish liability. As is discussed below, at least one of the required elements for each of these theories of liability was shown to be absent by the overwelming weight of the summary judgment evidence. Therefore, under *Celotex*, summary judgment was appropriate.

1. *Louisiana Civil Code Article 2315*

Louisiana Civil Code Article 2315 sets forth the right to recover for the negligence of another. The Louisiana Supreme Court has interpreted this Article under what is known as a duty-risk analysis. *Dixie Drive It Yourself System of New Orleans Co. v. American Beverage Co.*, 242 La. 417, 137 So.2d 298 (1962). A duty-risk analysis supplants the traditional proximate cause inquiry, requiring instead a determination of whether the defendant owed a duty to the plaintiff and whether the risk of injury sustained by the plaintiff fell within the ambit of that duty. The existence of a duty is, accordingly, an essential element of the claim for negligence under Louisiana law.

Shell's Motion for Summary Judgment on the negligence claim was granted because the undisputed facts showed that Shell did not owe a duty to Ainsworth in this situation. This is because under Louisiana law, a principal is not liable for offenses committed by an independant contractor in the course of performing its contractual duties. *Hawkins v. Evans Cooperidge Co., Inc., 766 F.2d 904 (5th Cir. 1985); Robideaux v. Hebert,* 118 La. 1089, 43 So. 887 (1907). As is more fully set forth in the opinions rendered by the Fifth Circuit (Petitioners' App. at B1-B23) and the district court (Petitioners' App. at C1-C31), the summary

judgment evidence clearly showed that at the time of his injury, Ainsworth was an employee of Hercules, which had contracted with Shell to place its rig on Shell's platform. The evidence clearly indicated that Shell had no control over the operations undertaken by Hercules and did nothing to cause the accident involved in this case. Ainsworth's own testimony was to the effect that he received all of his orders from Hercules' supervisors and that he had never received any instructions from any Shell employee. As a result, Shell, as a principal hiring an independent contractor, had no duty to the plaintiff under Louisiana law. Since, in the absence of such a duty, petitioners could not recover from Shell, it is clear that an essential element of plaintiffs' claim was absent. Under *Celotex*, therefore, summary judgment was appropriate.

2. *Louisiana Civil Code Article 2317*

Louisiana Civil Code Article 2317 imposes strict liability in situations where a defective object within the custody or control of a defendant causes injury. The Louisiana Courts have held that liability can be imposed under Article 2317 only when:

(1) the thing causing damage was in the defendant's custody;

(2) the thing had a vice or defect, and

(3) the vice or defect occasioned damage.

Stewart v. Sam Wallace Indus. Co., 409 So.2d 335 (La.App. 1st Cir. 1981), *writ refused*, 413 So.2d 497 (La. 1982). "Custody" as used in this article means supervision and control. *Steele v. Helmerich & Payne International Drilling Co.*, 738 F.2d 703, 707 (5th Cir. 1984); *Colleps v. State Farm General Insurance Company*, 446 So.2d 988 (La.App.3d Cir. 1984).

As is more fully set forth in the lower court opinions, the uncontroverted summary judgment evidence revealed

that Shell did not have custody of the Hercules drilling rig. All the summary judgment evidence indicated that the materials involved belonged to Hercules and that no Shell employees were expected to participate in the rig-up, for which Hercules bore full responsibility. Without "custody" there can be no liability under Article 2317, since custody is one of the essential elements which must be proved in order for liability to exist. Again, because petitioners completely failed to set forth any evidence to support this essential element of their claim under Article 2317, summary judgment was appropriate under *Celotex*.

3. *Louisiana Civil Code Article 2322*

Finally, petitioners asserted liability under Louisiana Civil Code Article 2322, which imposes strict liability on building owners under certain circumstances. The Louisiana authorities are clear that in order to establish liability under Article 2322, the plaintiff must prove the following essential elements:

(1) that there was a building;

(2) that the defendant was the owner; and,

(3) that there was a ruin caused by a vice in construction or a neglect to repair the building.

Olsen v. Shell Oil Company, 365 So.2d 1285, 1289 (La. 1979).

The undisputed facts of this case revealed that the drilling rig on which Ainsworth was injured was under construction at the time of his accident. As a result, the lower courts correctly concluded that under Louisiana law, any "ruin" could not have resulted from a "vice in original construction" or a "neglect to repair". Since this is one of the essential elements which must be proved for liability to exist under Article 2322, this claim was properly disposed of by summary judgment.

In essence, the holding of the lower courts was that as a matter of law, Article 2322 is inapplicable to situations involving injuries which occur during construction. This interpretation is consistent with numerous Louisiana authorities such as *Temple v. General Insurance Co. of America*, 306 So.2d 915 (La.App. 1st Cir. 1974); *Fonseca v. Marlin Marine Corp.*, 410 So.2d 674 (La. 1981); *Rapattoni v. Commercial Union Ins. Co.*, 378 So.2d 953 (La.App.3d Cir. 1979); *Stine v. Creel*, 417 So.2d 1243 (La.App. 1st Cir. 1982), *writ denied*, 422 So.2d 163 (La. 1982); *Daroca v. Metropolitan Life Ins. Co.*, 121 F.2d 917 (5th Cir. 1941); and *Matthews v. Southern Amusement Co.*, 199 So.2d 403 (La.App.3d Cir. 1967). The question of whether a specific state statute is applicable to a given fact situation is, of course, one which is mostly appropriately left to the state courts and lower federal courts which are most familiar with the idiosyncracies and interpretations of the particular statute involved.

CONCLUSION

Respondent, Shell Offshore Inc., respectfully submits that there are no "special and important reasons" why this case should be reviewed by this Court. The issues involved here, which were correctly decided by the lower courts, are primarily ones of the interpretation and application of the law of the State of Louisiana and have no substantial importance or application outside of the state. Furthemore, the lower federal courts in this matter followed the teachings of this Court in *Celotex* and the guidelines of Rule 56 precisely in ruling on respondent's Motion for Summary Judgment. Accordingly, the case does not merit review and respondent, Shell Oil Offshore Inc., submits

that the Petition for Writ of Certiorari filed by Fred H. Ainsworth and Gloria Ainsworth should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief in Opposition has been served upon all counsel of record by depositing same into the United States Mail, properly addressed and postage prepaid, this _____ day of April, 1988.

JAMES E. BLAZEK
EDWIN C. LAIZER
SCOTT E. DELACROIX

and

JUDITH Y. ROBERTSON

APPENDIX A

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, countercliam, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answes to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material

facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissable in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.